

DAVID M. HICKS

**DEFENSE MOTION TO  
DISMISS CHARGE 1 OFFENSE  
OF "DESTRUCTION OF  
PROPERTY BY AN  
UNPRIVILEGED  
BELLIGERENT"**

**4 October 2004**

The defense in the case of the *United States v. David M. Hicks* moves to strike the words and charges of “destruction of property by an unprivileged belligerent” (as an object of the alleged conspiracy) from Charge 1, and states in support of this motion:

1. **Synopsis:** Charge 1 alleges, *inter alia*, that Mr. Hicks conspired to destroy property (that is not otherwise identified) while he did not enjoy combatant immunity. Assuming *arguendo* that Mr. Hicks engaged in such conduct, it would not constitute a violation of the law of war. Therefore, that portion of Charge 1 fails to state an offense that can be tried by military commission, and must be stricken from the charges.

**2. Facts:** Military Commission Instruction No. 2 (MCI 2), which first defined the “offense” of “destruction of property by an unprivileged belligerent” was published *after* Mr. Hicks’s alleged charged conduct was performed, and even after he was taken into custody by the United States.

### 3. Discussion:

### **A: Destruction of Property by an Unprivileged Belligerent Is Not a War Crime**

It is not a violation of the **law of war** for an unprivileged combatant to destroy property.<sup>1</sup> Combatants are granted "immunity" from prosecution for acts such as deliberately destroying a building or bridge, so long as the property is a legitimate military target. Unprivileged combatants, on the other hand, do not enjoy "combatant immunity," and, can be prosecuted for destruction of property. However, such prosecution may not be before a military commission. The proper forum in which to try an unprivileged combatant for destroying property is the same as that for other crimes against property which are not violations of the laws of war--the civilian criminal court of the State in which the offense occurred.

Alleged crimes occurring in the armed conflict which do not violate the law of war are subject to prosecution only in the civilian criminal courts regardless of the person's status under the law of war as a privileged combatant, unprivileged combatant, or civilian. Thus, there is not any law of war or statutory basis for the crime of "destruction of property by an unprivileged belligerent"

<sup>1</sup> It would be a crime under the law of war for an unprivileged combatant to destroy property that the law of war prohibits from being destroyed: attacking buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected. However such actions would be triable by a military commission *not* because of the status of the *attacker* as an unprivileged combatant, but because the *acts themselves* are violations of the law of war. Charge 1 does not allege that Mr. Hicks engaged in such conduct proscribed by the law of war; conversely, the vague and conclusory allegations Charge 1 does make with respect to the destruction of property are not found within, or chargeable or punishable under, the law of war.

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war or statutory basis for the crime of “destruction of property by an unprivileged belligerent” that is contained within the conspiracy charged in Charge 1. As a result, it must be excised from the illegal objects of the conspiracy alleged in Charge 1.

**B: Congress Has Not Made “Destruction of Property by an Unprivileged Belligerent” an Offense Triable by Military Commission**

The only other potential source of authority for offenses eligible for charge and trial by military commission is Congress: Article 21 of the Uniform Code of Military Justice (UCMJ), establishes military commission’s jurisdiction over “...offense[s] **that by statute or by the law of war may be tried by military commission** . . .”<sup>2</sup> (emphasis added). It is in part from this statute that a President draws the authority to establish military commissions.<sup>3</sup>

Yet, there are only two non-law of war offenses Congress has approved for trial by military commissions—Aiding the Enemy, Article 104, UCMJ and Spies, Article 106, UCMJ – and “destruction of property by an unprivileged belligerent is not among them. Congress has never authorized a military commission to try civilians for “destruction of property by an unprivileged belligerent.” Indeed, to do so would defy logic, sense, and longstanding law of war principles, since the appropriate forum to try individuals who lack combatant immunity for deliberately destroying property already exists in the form of the civilian courts. Accordingly, “destruction of property by an unprivileged belligerent” as set forth in MCI No. 2, and repeated in Charge 1 against Mr. Hicks, is not triable by military commission, thereby depriving this military commission of jurisdiction to try Mr. Hicks for such an offense.

Further, such a charge would constitute an impermissible *ex post facto* law with respect to Mr. Hicks. No U.S. military commission has ever charged or tried an individual for an offense of “destruction of property by an unprivileged belligerent,” and MCI No. 2 is without authority to create such an offense. Moreover, even if MCO No. 2 could manufacture such an offense, the *ex post facto* application of the charge to Mr. Hicks would strip this commission jurisdiction to try and/or punish Mr. Hicks for it.

Indeed, MCI No. 2 itself directs that this military commission can try only those offenses that existed under the law of war at the time of their commission: Section 3(A) of MCI No. 2 explicitly states that “[n]o offense is cognizable in trial by a military commission if that offense did not exist prior to the conduct in question.”<sup>4</sup>

In this case, MCI No. 2 was published *after* Mr. Hicks allegedly performed the conduct with

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<sup>2</sup> 10 U.S.C. §821.

<sup>3</sup> See President’s Military Order of 13 November 2001, first paragraph. Note: “sections 821 and 836 of title 10, United States Code” are Article 21 and Article 36 of the Uniformed Code of Military Justice, respectively.

<sup>4</sup> In addition, international law prohibits States from charging individuals with conduct which did not constitute a criminal offense at the time when it was committed. Article 15(1) of the *International Covenant on Civil and Political Rights* states that “[n] one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.” Article 75(4)(c) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* has similar language. It states that “[n]o one shall be accused or convicted of a criminal offense on account of any act or omission which did not constitute a criminal offense under the national or international law to which he was subject at the time when it was committed.”

which he is charged, but also even after he was within the custody of the United States.<sup>5</sup> Thus, even under the commission's own rules as promulgated in MCI No. 2, this commission does not have jurisdiction over the alleged "destruction of property by an unprivileged belligerent," and may not try Mr. Hicks for it. Accordingly, this commission should dismiss that portion of Charge 1 pertaining to "destruction of property by an unprivileged belligerent."

4. In making this motion, or any other motion, Mr. Hicks does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this military commission to charge, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in any and all appropriate forums.

**5. Evidence:**

**A:** The testimony of expert witnesses.

**B:** Attachments

1. *International Covenant on Civil and Political Rights*, Article 15.

2. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, Article 75.

**6. Relief Requested:** The defense requests the words "destruction of property by an unprivileged belligerent" be struck from Charge 1.

7. The defense requests oral argument on this motion.

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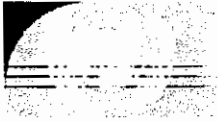
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<sup>5</sup> MCI No. 2 is not binding on this commission. It is merely the Department of Defense's position on the law. The controlling principles for this commission – with respect to what constitutes a violation of the law of war – emanate from the law of war and any statutory authority provided by Congress. Neither provides authority for charging and/or punishing Mr. Hicks for the alleged "destruction of property by an unprivileged belligerent." Consequently, any attempt to incorporate that concept into the charges against Mr. Hicks must be rejected.



**Office of the High  
Commissioner for Human Rights**



**International Covenant on Civil and Political Rights**

**Adopted and opened for signature, ratification and accession by  
General Assembly resolution 2200A (XXI) of 16 December 1966**

***entry into force* 23 March 1976, in accordance with Article 49**

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**Article 15**

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

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fulltext



**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the  
Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.**

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## Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined,

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the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

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